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IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1351

DONALD ROBERT BRENNEMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX.

	PAGE
Citations to Opinion Below	1
Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions, Statutes and Rules Involved	2
Statement of Facts	3
Reasons for Granting the Writ	4
Appendix "A"—Opinion of the Court	11
Appendix "B"—Judgment	16
Appendix "C"—*Sur* Petition for Rehearing	17

TABLE OF CASES.

Portomene v. United States, 221 F. 2d 582 (C. A. 5, 1955)	7, 8
Rovario v. United States, 353 U. S. 53, 77 S. Ct. 623 (1957)	8
Sorrentino v. United States, 9 Cir., 163 F. 2d 627	7, 8
Wilson v. United States, 59 F. 1d 390 (C. A. 3, 1932)	8

STATUTE.

28 U. S. C. § 1254(1)	2

CONSTITUTION.

United States Constitution, Fifth Amendment	2

MISCELLANEOUS.

Underhill's Criminal Evidence, (3d ed.) § 287, p. 395	9

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on March 21, 1972.

Citations to Opinion Below

The Opinion of the United States Court of Appeals for the Third Circuit, filed February 11, 1972, is printed in Appendix "A" hereto. The judgment of the United States Court of Appeals for the Third Circuit entered February 11, 1972, affirming the judgment of the United States District Court for the Western District of Pennsylvania filed July 6, 1971, is printed in Appendix "B" hereto. The Order of the United States Court of Appeals for the Third Circuit

denying the petition for rehearing entered March 21, 1972 is printed in Appendix "C" hereto.

Jurisdiction

The judgment of the Court of Appeals below, Appendix "B", was entered on February 11, 1972. Rehearing was sought and the petition for rehearing was denied on March 21, 1972 and judgment entered March 21, 1972. Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented for Review

1. Where during the trial the defendant is apprised of the existence of a so-called confidential informant on cross examination of a government witness; when disclosure of the identity of the so-called confidential informant is requested, the court ruled that the government can protect the confidential informant and stated on the record "I will adhere to it"; and where the jury deliberates for over twenty hours before returning a verdict of guilty, did the ruling of the court deprive the defendant of useful evidence to establish his innocence or at least tip what obviously must have been close to evenly balanced scales in favor of an acquittal rather than the ultimate result of conviction?

Constitutional Provisions, Statutes and Rules Involved

The constitutional provisions involved are the Fifth Amendment to the Constitution of the United States, due process of rights; depriving defendant of a fair trial and the right to call a witness whose identity is concealed by the prosecution on information concerning the circumstances involving the matters for which defendant stands indicted.

Statement of Facts

The petitioner, Donald R. Brenneman, was indicted in the United States District Court for the Western District of Pennsylvania on a four-count indictment. The first count charged the petitioner herein and two others, Gary Lee Hershberger and William Charles Holly, with unlawfully selling, delivering and disposing of 161.5 grams of DL amphetamine sulphate; the second count charged the petitioner and the same two individuals with the same offense for the sale of 204.2 grams of DL amphetamine sulphate; the third count charged the petitioner and the same two individuals with manufacturing said drug, and the fourth count charged petitioner and the same two individuals with a conspiracy to violate the narcotic laws of the United States.

On May 3, 1971 the trial of the petitioner proceeded before the Honorable Rabe F. Marsh and a jury against petitioner only, the other two having indicated their intent to plead guilty to the offenses charged. The trial concluded on Friday, May 7, 1971, at 4:00 P. M., after 695 pages of testimony. On Monday, May 10, 1971, counsel closed to the jury and the court charged the jury and they retired to deliberate, at 1:05 P. M. When the jury had not returned by 6:30 P. M., the court stated it would take a sealed verdict and the jury then deliberated until later in the evening. The next morning, May 11, 1971, the jury had additional questions and resumed after the court had basically instructed them that the matters would rest with their collective recollections. They retired and deliberated until approximately 5:00 P. M., when a verdict of "guilty" on all counts was returned. On July 6, 1971 the court sentenced petitioner to undergo imprisonment for a term of three years to be released at any time and to pay a fine of

$3,000.00. It is from this judgment that the appeal was taken.

Reasons for Granting the Writ

Petitioner's defense involved a factual issue as to whether government witnesses were credible in testifying that he did unlawfully sell and manufacture amphetamine sulphate and whether the petitioner and his witnesses were credible in testifying that the residue found in petitioner's chemical laboratory could result from the type of experiments petitioner was engaged in or whether it could have come from a package which petitioner testified one of the witnesses had given him for analysis.

The one witness, Holly, testified that he had never sold narcotics before but just happened to start talking about it with a witness, Hershberger. Hershberger was the only witness who tied the petitioner to the manufacture of the amphetamine. Holly told Hershberger he thought he could find a buyer and that he would report back to him. Holly further testified that he talked to a friend who said he could buy quantities of "speed" and that he could find someone who would buy quantities of "speed". He reported this to Hershberger. After further discussion, Holly saw his friend and told him that he would have a quantity of "speed" for sale. Hershberger delivered the drug to Holly at the dairy store and between 7:00 and 7:30 his friend came in with a customer, who turned out to be a narcotics agent. Holly further testified to the payment of the money, the division between Holly and Hershberger, and that some of the money went to his friend who introduced him to the narcotics agent (15a). Holly was not sure how much he gave to the friend, but it was either $50.00 or $100.00, but

he believes he gave him $50.00 on the first sale and $50.00 to $100.00 on the second sale (27a).

In cross examination counsel interrogated this witness as to the circumstances under which he suddenly arranged to sell "speed" for his friend, Gary Hershberger and how he would discuss such a matter with the friend, whose name had not been disclosed on direct examination. Counsel then asked:

"Q. And then he asked you to find a buyer for him and you had a friend who suddenly came up with, who we now know Eduardo is Edward Scheid, is that right?

A. Right.

Q. No, what was this friend's name?

Mr. Scarlata: Objection, your Honor. Again, this is the confidential informant.

Mr. Gondelman: It is not a confidential informant. It is a friend who went to this witness, not a Government Agent, and offered to solicit him in getting a purchaser of drugs. He was not an employee of the Narcotics Bureau at the time his friend visited him.

Mr. Scarlata: Again, I think Mr. Gondelman has it backwards. Mr. Holly went to the friend and said, 'Do you know anybody?'

Mr. Gondelman: This is even better. That is even better. Mr. Holly went to a friend, not a confidential informant.

Mr. Scarlata: Who is a confidential informant for the Bureau of Narcotics.

Mr. Gondelman: I am entitled to inquire on cross examination as to who the friend was. This man stated he has never sold drugs before and I have to test his credibility to get the facts before this Jury.

The Court: I ruled the Government can protect the confidential informant and I will adhere to it.

Mr. Gondelman: Then they ought to drop this case.

The Court: Maybe they will have to, but at this point you can't ask him that question. The objection is sustained.

Mr. Gondelman: I cannot ask him the identity of the confidential informant, as claimed by the Government?

The Court: I may change the ruling later, if you can show me some authority to do that.

Mr. Gondelman: I will just claim the prejudice." (112a-114a)

In identifying the undisclosed "friend," the witness stated that the party was a patron of the dairy store and usually came in for coffee every night about five or six o'clock. He also testified that his "friend" graduated a year ahead of the witness and was a casual acquaintance.

The trial of this case was bitterly contested, mainly on the issue of whether or not the appellant, who was a chemist and who had a laboratory which he had identified as being used in connection with his research and employment in the anti-corrosion field, had manufactured the amphetamine furnished to the narcotics agents by Holly and Hershberger. Considerable testimony relating to the chemical field was elicited and is not reproduced for the Court since it was all of a technical nature in an effort to convince the jury that appellant-petitioner was not guilty of the charges. The remaining issues for the jury were the credibility of Holly, an alleged co-conspirator and accomplice, who had subsequently entered a plea of guilty and received probation and Hershberger, who received a 3-month jail sentence. The narcotics agents had never met the petitioner and the sole witness able to produce evidence of the guilt of the petitioner was Hershberger. The chemicals found in petitioner's laboratory containing residue of Dl amphetamine sulphate was the issue as to which the chemist for the Narcotics Bureau and the Professor of the University of Pittsburgh testified to at length, the main issue being whether such residue could result from the type of experiments petitioner was engaged in or whether it could have come from a package which petitioner testified Hershberger had given to him for analysis.

The petitioner emphatically and categorically denied he had engaged in the manufacture of Dl amphetamine sulphate or that he had supplied any to Hershberger. The credibility of petitioner was bolstered by the fifteen character witnesses who were called on his behalf to show that he had an excellent reputation for being an honest and law-abiding citizen.

The jury struggled with the conflict in testimony for the better part of two days. They submitted extensive questions which were impossible for the court to answer because of the potential prejudice had they been answered one way or the other (747a-757a). Obviously, with a jury who had deliberated approximately twenty hours as to the guilt or innocence of the petitioner, every scrap of evidence which could have been produced for a defendant becomes even more crucial. Without the name of the so-called confidential informant, who was also a friend of an accomplice and who had been first contacted as a friend and not as a confidential informer, the petitioner was unable to determine whether such a person existed at all and if so, whether testimony could have been elicited which would have aided the petitioner and tipped the scales in his favor.

In *Portomene v. United States*, 221 F. 2d 582 (C. A. 5, 1955), the Court held:

> "When it comes, however, to the point mainly and most vigorously argued, that it was error to deny the defendant's request for the name of the informer to whom it was claimed the defendant had sold the narcotics, we are in no doubt that the appellant has the right of it. In Sorrentino v. United States, 9 Cir., 163 F. 2d 627, the court pointed out the distinction between the case where the person called an informer is that and nothing more, in which case the defendant would not have been entitled to have his identity disclosed, and a case such as this one, where the informer

> is the person to whom the defendant is said to have sold and dispensed the opium described in the indictment. In such a case information as to this person's identity was material to the defense, and the denial of the requested information was error."

In *Rovario v. United States*, 353 U. S. 53, 77 S. Ct. 623 (1957), the Supreme Court appears to have approved the *Portomene* and *Sorrentino* cases for the proposition that the identity of an informer must be disclosed whenever the informer's testimony may be relevant and helpful to the accused's defense. The Supreme Court further held:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

The Supreme Court further held:

> "once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable."

The Circuit Court of Appeals for the Third Circuit has long ago recognized the importance of the disclosure of the identity of a government witness under circumstances similar to the instant case. In *Wilson v. United States*, 59 F. 1d 390 (C. A. 3, 1932), the Court was confronted with the issue of the refusal of a witness to name the person giving prohibition agents access to premises of the defendant. The witness was adjudged in contempt. The Court held:

> "There is, however, an exception to this rule or a modification of this general doctrine, in that it gives way to another doctrine of the law when the two con-

> fliet. A trial court must dispose of the cause before it. If what is asked is useful evidence to vindicate the innocence of the accused or lessen the risk of false testimony or is essential to the proper disposition of the case, disclosure will be compelled. Centoamore v. State, 105, Neb. 452, 181 N. W. 182; Regina v. Richardson, 2 Fost. & F. 693; Marks v. Dreyfus, L. R. 25 Q. B. D. 494; Humphrey v. Archibald, 20 Ont. App. 267; Wigmore on Evidence, p. 3331."

Similarly, in Underhill's Criminal Evidence, (3d ed.) § 287, p. 395, the author states:

> "But when the question arises in a criminal trial (as to the identity of a confidential informant), and the information is material to determine the defendant's innocence, it would seem both reasonable and just that the necessity and desirability of the disclosure and the question whether the public interest would be benefited or would suffer should be solely for the judicial discretion upon the circumstances of the case."

In the instant case, the only persons knowing the discussions between the informant and Holly were the informant and Holly. No other witnesses were available to testify concerning what occurred between the two. No one was able to ascertain what the unknown informant knew about the transaction or the reasons for which he was paid a portion of the proceeds of the sale of the narcotics. Holly testified concerning his activities with his friend. No amount of cross examination of Holly would replace the potential testimony of the unknown informant himself. Such testimony might even have led to the petitioner's being able to raise the issue of entrapment. Unless and until the informant is disclosed, the petitioner should not be compelled to conjecture as to whether the testimony of such informant would be helpful to his defense.

Certainly, in the instant case the identity of the so-called confidential informant was known to two of the defendants

subject to the same indictment as the petitioner. The only defendant unaware of the former's identity was the only defendant who had need of the informer's identity and that is the petitioner herein, who entered a plea of "not guilty" and has protested his innocence of the charge.

In a case bitterly contested, every scrap of potential evidence available to the defendant must be made available to him. Where a jury deliberates for twenty hours and asks the court for additional instructions, then returns a verdict of guilty resulting in a three-year imprisonment sentence, it is patently unfair to deny *in vacuo* that the testimony of a so-called confidential informant would not have cast doubt on the testimony of the government witness and tipped the scales in favor of an acquittal. Without knowing who the informer is or what he would testify to, it is obvious that the burden of proving how the informant could have helped the petitioner imposes an impossible burden and a most illogical one upon the petitioner. The court had emphatically ruled that the name of the informant would not be disclosed. Petitioner should not now be told he should have performed the useless task of trying to secure an *in camera* proceeding. The only way to test the knowledge of the informant is to permit defense counsel to call the witness for defense purposes. Failure of the trial court to permit this to be done has deprived the petitioner of a fair trial and is valid and substantial reason for this Court to grant certiorari on the issue.

Respectfully submitted,

JEROME M. LIBENSON,
HAROLD GONDELMAN,

Attorneys for Petitioner.

APPENDIX "A"

Opinion of the Court

(Filed February 11, 1972.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1733

UNITED STATES OF AMERICA,

v.

DONALD ROBERT BRENNEMAN, GARY LEE HERSHBERGER, WILLIAM CHARLES HOLLY,

DONALD ROBERT BRENNEMAN,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Argued January 17, 1972.

Before: Adams and Rosen, Circuit Judges, and Stapleton, District Judge.

PER CURIAM:

Gary Lee Hershberger, William Charles Holly, and appellant, Donald R. Brenneman, were charged in a four count indictment with manufacturing and selling dl amphetamine sulphate and conspiring to violate the narcotics laws

of the United States. Hershberger pleaded guilty to one count; Holly pleaded guilty to two counts. Both testified for the government at the trial of the charges against Brenneman. The remaining counts of the indictment against Hershberger and Holly were dropped.

In early March of 1970, Holly and Hershberger reached a "mutual understanding." Holly would locate someone who would buy substantial quantities of "speed"; Hershberger would find a source. In pursuing his part of the understanding, Holly talked to "a friend". The friend purportedly located a buyer and a meeting was arranged. Holly received a bottle of dl amphetamine sulphate from Hershberger. That evening the friend brought "Ed" to the dairy bar where Holly worked. Holly and Ed sat and talked about price and quality testing. The friend sat in a booth approximately fifteen feet away. Following their conversation Holly walked to the front of the store with Ed and handed him a bag containing the bottle. Holly gave the friend a small portion of the proceeds of the sale.

Ed turned out to be a narcotics agent; the friend turned out to be an informant. Appellant's counsel attempted to elicit the name of the friend during cross examination of Holly. The government successfully objected on the ground that he was a "confidential informant" and that no need for disclosure of his identity had been demonstrated.

Hershberger testified that Brenneman was the source and had produced the "speed" in his basement laboratory. Brenneman testified that he had never supplied Hershberger with drugs. The jury, after a lengthy deliberation, found Brenneman guilty as charged. Brenneman had a good reputation in his community and no prior criminal

record. He was sentenced to three years imprisonment and fined $3,000.

Brenneman here maintains that failure to disclose the identity of Holly's friend[1] was reversible error and that, under all of the circumstances of this case, the sentence imposed was an abuse of discretion. We find merit in neither contention.

Resolution of a question raised by a demand for disclosure of the identity of a confidential informant "calls for balancing the public interest in protecting the flow of information against the individual's right to prepare a defense." *Roviaro v. United States*, 353 U. S. 53, 62 (1956). In order to tip the scales in favor of disclosure, there must be some indication that access to the informer may be "helpful to the defense of an accused" or "essential to a fair determination of a cause." *Roviaro v. United States*, *supra*, at 60-61.

As in *United States v. Konigsberg*, 336 F. 2d 844, 848 (3rd Cir. 1964), we are convinced from the record that disclosure of the informant's identity would not have been helpful to the defense here and was "palpably not essential to the fair determination of this cause." Appellant's specu-

[1] Appellant maintains that Holly's knowledge of the identity of the informant is inconsistent with the government's assertion that his identity was a "confidential" matter. Appellant relies upon the court's observation in *Roviaro v. United States*, 353 U. S. 53, 60 (1956), that the government's privilege against disclosure terminates when the "identity of informer has been disclosed to those who would have cause to resent the communication." At that point, the goal of keeping sources of information secret in order to protect them from retaliation is unobtainable. But, the Supreme Court in *Roviaro* certainly did not indicate that the informant's privilege terminated when the identity of an informer, although already known to someone who would have reason to be vindictive, was still unknown to others who would have cause to retaliate.

lation[2] that testimony or information from the informant might have been used to impeach or cross examine Holly and "might even have led to the appellant's being able to raise the issue of entrapment" does not persuade us to the contrary.

Here the informant's participation was peripheral. He was not in a position to contradict or amplify any of the Holly testimony upon which Brenneman's conviction rests. The significance of Holly's testimony so far as Brenneman was concerned was that a sale of dl amphetamine supplied by Hershberger took place.[3] Hershberger, not Holly, implicated Brenneman.

Nor is there any indication that the informant could have provided a basis for a claim of entrapment. In addition to the fact that Holly and Hershberger conceived the scheme before Holly's friend was contacted, Brenneman himself gave testimony which was irreconcilable with any theory of entrapment.

Finally, we find no extraordinary circumstances warranting review of appellant's sentence. Compare *United States v. Tucker*, U. S. (No. 70-86, Jan. 11, 1972). It was in conformity with the statute and we decline to review it. *United States v. Fessler*, No. 71-1820 (3rd Cir. Jan. 6, 1972); *United States v. Restaino*, 405 F. 2d 628 (3rd Cir. 1968), *cert. denied*, 394 U. S. 904 (1969); *Gore v. United States*, 357 U. S. 386 (1958); *United States v. Brown*, 382 F. 2d 52

[2] Appellant's counsel offered the court below no factual basis for treating his assertions as anything other than speculation and did not request an *in camera* examination of the informant by the court. Compare *United States v. Jackson*, 384 F. 2d 825 (3rd Cir. 1967), *cert. denied*, 392 U. S. 933 (1968).

[3] The record also discloses a subsequent sale at which the friend was not present.

(3rd Cir. 1967); *United States v. Frank*, 245 F. 2d 284 (3rd Cir. 1957), *cert. denied*, 355 U. S. 819.

The judgment of the District Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX "B"

Judgment

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1733

UNITED STATES OF AMERICA,
vs.
DONALD ROBERT BRENNEMAN, GARY LEE HERSHBERGER, WILLIAM CHARLES HOLLY,
DONALD ROBERT BRENNEMAN,
Appellant.

(D. C. Criminal No. 70-342.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Present:

Adams and Rosen, Circuit Judges and Stapelton, District Judge.

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court, filed July 6, 1971, be, and the same is hereby affirmed.

ATTEST:

THOMAS P. QUINN,
Clerk.

February 11, 1972.

APPENDIX "C"

***Sur* Petition for Rehearing**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1733

UNITED STATES OF AMERICA,

v.

DONALD P. BRENNEMAN, GARY LEE HERSHBERGER, WILLIAM CHARLES HOLLY,

DONALD ROBERT BRENNEMAN,

Appellant.

Present:

Chief Judge Seitz, Judge Van Dusen, Judge Aldisert, Judge Adams, Judge Gibbons, Judge Rosenn, Judge Rosen, Judge Hunter and District Court Judge Stapleton.

The petition for rehearing filed by Donald R. Brenneman in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

By the Court,

ARLEN M. ADAMS,
Judge.

Dated: March 21, 1972.